

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

APPEAL FORM

To: General Counsel
Attn: Office of Appeals
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

Date: December 16, 2021

Please be advised that an appeal is hereby taken to the General Counsel of the National Labor Relations Board from the action of the Regional Director in refusing to issue a complaint on the charge in

Almatis, Inc.

Case Name(s).

15-CA-279185

Case No(s). *(If more than one case number, include all case numbers in which appeal is taken.)*


(Signature)



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December 16, 2021

Via Electronic Filing

Mark E. Arbesfeld, Director
National Labor Relations Board, Office of Appeals
1015 Half Street SE
Washington, DC, 20570

**Re: Almatris, Inc., Case 15-CA-279185
Charging Party USW's Position Statement in Support of Appeal**

Dear Mr. Arbesfeld:

Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW" or "Union") submits this Position Statement in support of its appeal in the above-captioned case. Because Region's 15's decision not to issue a complaint turns on credibility determinations that can best be made by an ALJ, the USW's appeal should be granted, and Region 15 should be directed to issue a complaint in this case.

The charge in this case alleges that Almatris, Inc. ("Almatris" or "Company") suspended and then discharged Local Union (b) (6), (b) (7)(C) in retaliation for (b) (6), (b) (7)(C) Union activity, protected concerted activity, and participation in NLRB proceedings. The complete facts are set forth in the affidavits of (b) (6), (b) (7)(C), (b) (7)(D) and (b) (6), (b) (7)(C), (b) (7)(D). The Region's decision not to issue a complaint turns on two credibility determinations in particular.

First, on July 2, 2020, (b) (6), (b) (7)(C) texted two (b) (6), (b) (7)(C) pictures to (b) (6), (b) (7)(C) coworker (b) (6), (b) (7)(C)). The next day, July 3, 2020, (b) (6), (b) (7)(C) texted (b) (6), (b) (7)(C) “No more (b) (6), (b) (7)(C) pictures. (b) (6), (b) (7)(C) uses my ph[one.]” (b) (6), (b) (7)(C) was unaware that (b) (6) had sent the (b) (6), (b) (7)(C) pictures. (b) (6), (b) (7)(C) explained that (b) (6) was trying to delete the pictures, but accidentally sent the pictures to (b) (6), (b) (7)(C) instead of deleting them. (b) (6), (b) (7)(C), (b) (7)(D) Despite (b) (6), (b) (7)(C) explanatory text message to (b) (6), (b) (7)(C) and ample evidence that (b) (6), (b) (7)(C) regularly made mistakes in (b) (6), (b) (7)(C) texts, the Region discredited (b) (6), (b) (7)(C) and determined that (b) (6) had intentionally sent the (b) (6), (b) (7)(C) pictures to (b) (6), (b) (7)(C).

Second, on September 14, 2020, (b) (6), (b) (7)(C) texted (b) (6), (b) (7)(C) a picture of a computer tablet and asked (b) (6), (b) (7)(C) if they were supposed to use the tablet to fill out a certain required form. On September 23, 2020, as (b) (6), (b) (7)(C) was leaving work, (b) (6), (b) (7)(C) told (b) (6), (b) (7)(C) that something wasn’t right with the picture of the tablet. (b) (6), (b) (7)(C) then noticed that (b) (6), (b) (7)(C) was in the picture. (b) (6), (b) (7)(C), (b) (7)(D) As (b) (6), (b) (7)(C) explained to the Board Agent, because of how (b) (6) was sitting, (b) (6) had to twist around to take a picture of the tablet, and (b) (6) was unable to avoid including (b) (6), (b) (7)(C) in the picture. Without the benefit of a live demonstration, the Region discredited (b) (6), (b) (7)(C) and determined that the tablet was far enough away from (b) (6), (b) (7)(C) that (b) (6) could have taken a picture of the tablet that did not include (b) (6), (b) (7)(C). The Region therefore determined that (b) (6), (b) (7)(C) had ignored (b) (6), (b) (7)(C) request for “[n]o more (b) (6), (b) (7)(C) pictures.”

The NLRB Casehandling Manual instructs Regional Offices that where credibility is at issue, a complaint should issue unless the Region is able “to resolve credibility conflicts on the basis of objective evidence.” Casehandling Manual § 10064. Here, the objective evidence consists of text messages that show that (b) (6), (b) (7)(C) was unaware that (b) (6) had sent offensive pictures to (b) (6), (b) (7)(C). And without seeing where (b) (6), (b) (7)(C) was sitting when (b) (6) took the picture of the tablet, it is impossible to know whether (b) (6) could have taken the picture without including (b) (6), (b) (7)(C) or

whether (b) (6) was even aware that (b) (6), (b) (7)(C) was in the picture. The evidence that the Region is relying on to discredit (b) (6), (b) (7)(C) cannot possibly meet any reasonable definition of “objective evidence.” Region 15 should therefore be directed to issue a complaint, absent settlement, to allow an ALJ to make credibility determinations based on witness testimony.

Indeed, the Board recognizes that ALJs are uniquely well-situated to make credibility determinations. In *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), the Board recognized that “as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner’s credibility findings insofar as they are based on demeanor.” The Board continued, “Hence we do not overrule a Trial Examiner’s resolutions as to credibility except where the clear preponderance of *all* the relevant the evidence convinces us that the Trial Examiner’s resolution was incorrect.” *Id.* (emphasis in original).

Because this case turns on credibility determinations that are uniquely within the competence of an ALJ, the Union’s appeal should be granted, and Region 15 should be directed to issue a complaint alleging that Almatiss violated Sections 8(a)(1), (3), and (4) when it first suspended and then discharged (b) (6), (b) (7)(C)

Respectfully submitted,

Sasha Shapiro

Sasha Shapiro
Assistant General Counsel

SS (b) (6), (b) (7)(C)

cc: Ruben Garza, USW District 13 Director
Larry Burchfield, USW District 13 Assistant Director
Michael Martin, USW District 13 Staff Representative
(b) (6), (b) (7)(C), USW Local 4880 (b) (6), (b) (7)(C)
(b) (6), (b) (7)(C), USW Local 4880 (b) (6), (b) (7)(C)
Bruce Fickman, USW Associate General Counsel